***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-7550, 7607, 7617

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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REX-NORECO, INC.,

Plaintiff-Appellee
- Appellant

v.

ISIDORE GOODSTEIN, PARKSVILLE MOBILE MODULAR HOMES, INC., and ADAM FILIPOWSKI,

Defendants-Appellants
- Appellees.



# BRIEF OF PLAINTIFF-APPELLEE - APPELLANT

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## STATEMENT OF ISSUE PRESENTED FOR REVIEW BY THE CROSS-APPEAL

The only issue presented for appeal by the plaintiff-appellee-appellant's cross-appeal concerns the enforceability of that section of each of plaintiff's Pension and Profit Sharing Plans which provides that an employee discharged for cause is not entitled to receive any post-employment distribution from either Plan. Given the decision of the Court below, the issue may be framed by two questions:

> 1) Does the "forfeiture" provision impose an enforceable precondition on an employee's distribution rights or is it an unenforceable liquidated damages clause?
>
> 2) Is the "forfeiture" provision of the Rex-Noreco Pension and Profit Sharing Plan enforceable in accordance with its terms notwithstanding any disparity between the amounts Rex distributed to defendant Goodstein before learning of his breach of fiduciary duty and the damages Rex sustained from his misconduct?

## STATEMENT OF THE CASE

Rex-Noreco, Inc. ("Rex") brought this action (i) to enjoin defendant Isidore Goodstein ("Goodstein") from engaging in the retail sales of mobile homes within 200 miles of Rex's Loch Sheldrake, New York location, in breach of a non-competition agreement Goodstein had

entered into with Rex, (ii) to enjoin the other two defendants from assisting Goodstein in violating that agreement, and (iii) for monetary damages sustained by Rex as a result of Goodstein's breaches of fiduciary duties as an officer and employee of Rex (as well as those resulting from his breach of the non-competition agreement) including amounts which were distributed to Goodstein from Rex's non-contributory Pension and Profit Sharing Plans. Recovery of these distributions was sought because (a) Goodstein would have been discharged prior to his resignation had Rex known of his breaches of fiduciary duties at the time his employment terminated, (b) such discharge would have been "for cause" within the meaning of the relevant Plans, and (c) such discharge for cause would have terminated Goodstein's interests in the Plans and precluded any distributions to him under the Plans. In short, Goodstein's concealment of his misconduct and his resignation prior to discovery enabled him to obtain some $15,000 from Rex on false premises.

After a trial without a jury, the Court below, in a Memorandum dated March 24, 1975 (App.406-417)* found as a fact:

1. That, as claimed by Rex, Goodstein had entered into the August 14, 1970 non-competition agreement,

*"(App.406-417)" is herein used to refer to pages in the Joint Appendix filed in connection with the appeals and cross-appeal herein. For convenience of reference, the Memorandum of the Court below dated March 24, 1975 is also included in an annex to this Brief. (Annex 1, hereinafter sometimes referred to as "Ann. 1 p. ")

voluntarily, (Finding of Fact Nos. 1 and 2, App. 408-409; Ann. 1 pp. 1-2);

2. That, as claimed by Rex, Goodstein had taken steps to organize the retail mobile home business of defendant Parksville Mobile Modular Homes, Inc. ("Parksville") while still an employee of Rex (Findings of Fact Nos. 4-6 and 12, App. 409a-410; Ann. 1 pp. 3-4);

3. That, as claimed by Rex, in connection with the organization of Parksville, Goodstein charged a substantial number of long distance telephone calls to Rex, without the knowledge or consent of Rex (Findings of Fact No. 7, App. 409a; Ann. 1 p. 3);

4. That, as claimed by Rex, Goodstein did not devote his entire time, skill, labor and attention to Rex's business during the last 5 months of that employment - the period of time during which he was organizing Parksville (Findings of Fact No. 9, App. 409a; Ann. 1 p.3);

5. That, as claimed by Rex, a substantial portion of the units offered by Rex for sale at its Loch Sheldrake location compete with units offered by Goodstein's Parksville operation (Findings of Fact Nos. 15-18, 22, 32-34, App. 410-411, 414; Ann. 1 pp. 4-5);

6. That, as claimed by Rex, Goodstein's activities in connection with the organization of Parksville while still an officer and employee of Rex were never disclosed to Rex, were all done without Rex's consent and were not discovered by Rex until after Goodstein had resigned as an officer of Rex (Findings of Fact Nos. 8, 11, 13 and 14, App. 409a-410; Ann. 1 pp. 3-4);

7. That subsequent to Goodstein's resignation as an officer and employee of Rex, and before learning of his breach of fiduciary duties, Rex gave Goodstein an accounting and distribution of his interest in Rex Pension and Profit Sharing Plans (Findings of Fact No. 14, App. 410; Ann. 1 p. 4); and

8. That each of the Pension Plan and the Profit-Sharing Plan expressly provided that:

> "Any member who is discharged from the employment of the Company for cause shall lose and forfeit all of his rights in and to the benefits under the Plan. The words 'discharge for cause' shall be deemed to include those cases where a member has been discharged for proven dishonesty, the commission of a felony, the commission of misdemeanor involving moral turpitued, engaging as a principal of a competitive business, or disclosing trade secrets to a competitor."

(Pl. Ex. 47 and 48, App. 219, 225; Ann. 2 pp.2,8*; Finding of Fact No. 3, App. 409; Ann. 1 p.3)

* Pl. Ex. 47 and 48 are collectively annexed to this Brief for convenience of the Court as Annex 2 and are referred to herein as "Ann. 2 p. ".

Rex does not dispute any of these Findings of Fact in connection with its cross-appeal or in response to any arguments the defendants may make in support of their appeals.

In its March 24 Memorandum the Court below further concluded as a matter of law:

1. That the non-competition agreement was valid and enforceable under the governing New Jersey law (Conclusion of Law No. 2, App. 415)**;

2. That "Goodstein breached both his agreement with Rex and his fiduciary duty to Rex in that, for the last five months of his employment he took steps to organize a competing business and improperly charged to Rex a portion of the cost of organizing such business, without disclosure to any official of Rex." (Conclusion of Law No. 5, App. 415; Ann 1 p. 9)

3. That "Had Rex discovered Goodstein's activities in connection with the organization of Parksville prior to his resignation from employment, it would have been entitled to discharge Goodstein 'for cause' within the terms of the profit-sharing and pension plan and, assuming the enforceability of the forfeiture provision, to deprive him of his

** In the Court below, Rex and Goodstein agreed that there was no substantive difference between the law of New York and the law of New Jersey.

accrued benefits under the plan amounting to $15,041." (Conclusion of Law No. 6, App. 415-416; Ann 1 pp. 9-10);

4. That Rex is entitled to recover from Goodstein his accrued benefits of $15,041 if the forfeiture provision of the Pension and Profit-Sharing Plan is an enforceable liquidated damage clause (Conclusion of Law No. 7, App. 416; Ann 1 p. 10).

It is to be noted that, in the Court below, Rex had never claimed "forfeiture" provisions were liquidated damage clauses: as it is doing here, Rex argued that the relevant provisions imposed enforceable pre-conditions to the receipt of Plan distributions by employees.

In a later Memorandum dated May 14, 1974 (App.487-492), the Court below concluded as a matter of law that the forfeiture provisions of the Pension and Profit-Sharing Plan were unenforceable penalties (App. 490). On that basis the Court refused to include in the damages awarded to Rex, $15,041 of distributions which Rex had made to Goodstein in respect of those Plans promptly after his resignation from Rex's employ.

The only aspect of the disposition by the Court below from which Rex cross-appeals relates to that Court's conclusion that the forfeiture provisions are "liquidated damage" clauses and, as such, are unenforceable "penalties".

## ARGUMENT

### The "forfeiture" provisions of the Pension and Profit Sharing Plans impose conditions precedent on a Plan member's right to a post-employment distribution from the Plans and were never intended to serve as stipulated damage clauses.

There was no dispute that a Rex employee, such as Goodstein, was not entitled to any distribution from the Rex Pension and Profit Sharing Plans until such time as his employment by Rex terminated. Thus it was that, when Goodstein resigned as a Vice President of Rex on February 5, 1974, he requested a distribution in respect of his interests in the Pension and Profit Sharing Plans and, two days later, such a distribution was made to him in the amount of $15,041.

The Findings of Fact by the Court below that Rex had no knowledge of Goodstein's breaches of fiduciary duties prior to his resignation, coupled with its Conclusion of Law that Rex "would have been entitled to discharge Goodstein 'for cause' within the terms of the profit-sharing and pension plan" had it discovered those breaches of fiduciary duties prior to his resignation, (App. 415; Ann. 1 p.9), impliedly accepts Rex's contention that Rex would have discharged Goodstein had it known of his improper conduct. If discovery and discharge had occurred, instead of concealment and resignation, at the moment of the termination of his employment, Goodstein

would have had no interest in either of the Plans. In this respect operation of the so-called "forfeiture" provisions depends solely on the conduct of the employee prior to termination of his employment and not on any conduct which follows that termination.

Thus, it becomes apparent that the "forfeiture" provisions were intended to create a condition precedent to the receipt of benefits. There is no evidence and it would be illogical to conclude, as did the Court below, that the provisions were intended as stipulated damages for breaches of duty by an employee that might result in his discharge "for cause". It is obvious that commission of a felony or misdemeanor involving moral turpitude unrelated to the employer (two of the "causes" expressly enumerated in the provisions) might result in no demonstrable economic injury to the employer. Disclosure of trade secrets to a competitor by an employee with little seniority might cause enormous damage justifying recovery of substantial damages yet the amount of the interest lost by the disclosing employee would be minute. Assuming that "liquidated damages" preclude the recovery of actual damages, the express language of the provisions thus contradicts the conclusion of the Court below that the provisions were intended to stipulate the damages recoverable by Rex for the conduct justifying discharge.

The erroneous analysis of the issue by the Court below proceeded from the unfounded and erroneous assumption that the "forfeiture" provisions were intended as "a liquidated damage provision" and thus could be justified and enforced only if the standard governing liquidated damage clauses had been met. The Court made that assumption even though neither Rex nor Goodstein had ever so characterized the clauses,* there was no evidence upon which to base such an assumption and the Court cited none. The twin propositions (i) that the provisions were not the result of a good faith negotiation concerning anticipatable damages and (ii) that the amount of a forfeiture might be disproportionate to the amount of damage inflicted by a discharged employee, were but the correct minor premises of a fallacious syllogism founded on an unsupportable major premise. Indeed, nowhere in its Memorandum of May 14, 1975 does the Court below attempt to explain the basis for its major premise.

The express references in the provisions to felonies, misdemeanors involving moral turpitude and other behavior which might justify an employee's discharge without actually causing substantial economic injury to the employer, demonstrate that the pre-condition on enjoyment

* In the Court below Goodstein initially argued that the "forfeiture" clauses were contrary to public policy and later that they were made unenforceable by later amendments to the Internal Revenue Code.

of the Plan benefits was intended to serve the prophylactic objective of discouraging such behavior. Under the provisions, it is obvious that an employee who steals $500 might lose his right to a distribution many times that amount. No one would question that theft of $500 would justify discharge. Nor could any dispute the fact that legal action to recover the stolen funds would probably cost vastly more than $500. Accordingly, it was reasonable for an employer such as Rex to include in terrorem pre-conditions on its employees' enjoyment of corporate largesse in order to discourage behavior which was reasonably considered inimical to Rex's interests.

Furthermore, this provision was recognized by the Internal Revenue Service when it approved the inclusion of the "forfeiture" provisions in amendments to the non-contributory Pension and Profit Sharing Plans here at issue (App. 218-222 and 223-227; Ann. pp. 4 and 8). Goodstein and his fellow employees had never contributed one cent to the Plans: all funds distributable in respect of those Plans had been contributed by Rex. No agreement apart from the Plans themselves required Rex to make any contribution to the Plans, and all contributions to the Profit-Sharing Plan were completely optional. Thus, the day before Goodstein resigned he had no interest in either Plan except as provided by the terms of that Plan. Since each Plan clearly provided he would have

no interest if his employment were terminated "for cause", upon termination "for cause" he would not have been deprived of anything since he had nothing but a contingent expectation to start with. That would have been true had he been discharged for proven rape or murder, for a theft of $100,000 or of $500 (whether from Rex or a national bank) or for the initiation of efforts to direct business to a competitor of Rex.

The fact that Goodstein succeeded in concealing conduct that would have been cause for discharge until after he had received his Plan distributions should not give him rights that he would not otherwise have had under the Plans. Such a result, which the Court below reached, only rewards the employee who has the foresight to resign and request Plan distributions shortly before his wrongdoings are likely to be discovered. In so doing it penalizes honest employees since the ever-fluctuating assets of the Trusts are depleted by the distributions to unworthy former employees.

Under the law of New Jersey,* the forfeiture provisions of the Plans are valid and enforceable. Evo v. Jomac, Inc., 119 N.J. Super. 7, 289 A. 2d 551 (1972), and Specht v. Eastwood-Nealley Corporation, 34 N.J. Super. 156,

* The Court below concluded that New Jersey law governed the issue but that New York law would yield the same result in any event (App. 415). Plaintiff does not challenge the Courts's conclusion in either respect and thus includes reference to New York authorities as relevant if not controlling.

111 A. 2d 781 (App. Div. 1955). See also Kristt v. Whelan, 4 App. Div. 2d 195, 164 N.Y. S. 2d 239 (1st Dept. 1957), aff'd, 5 N.Y. 2d 807, 155 N.E. 2d 116 (1958); Kidd v. Oakes, 39 Misc. 2d 654, 241 N.Y.S. 2d 403 (App. Term 1963); Rochester Corp. v. Rochester, 450 F. 2d 118 (4th Cir. 1971).

In Evo, the New Jersey Superior Court recognized that, notwithstanding use of the term "forfeit", provisions in Pension and Profit-Sharing Plans divesting an employee of subsequent benefits in the event his conduct is inimical to the employer's interests impose an enforceable condition on the receipt of benefits. Indeed, the forfeiture clause in Evo would deprive a former employee who had been receiving distributions under the relevant plan of further benefits because of his engagement in "any activity which, in the judgment of the Board of Directors is in competition with" the business of the former employer. Even though the clause rested on relatively vague standards and would terminate benefits solely because of post-employment conduct, the Court upheld the validity and enforceability of the clause from and after the date of its incorporation into the relevant plan saying:

> "The restrictive clause merely creates a choice for the employee. If he desires to compete, he gives up the plan benefits: if he wishes to retain the benefits, he must comply with the imposed conditions. Such an available choice removes the condition from the proscription of the public policy underlying covenants which unreasonably restrain an employee from earining a livelihood. Barr v. Sun Life Assurance Co., 146 Fla. 55, 200 So. 240 (Sup.Ct. 1941);

Brown Stove Works, Inc. v. Kimsey, 119 Ga.App. 453, 167 S.E. 2d 693 (App. Ct. 1969); Flynn v. Murphy, 350 Mass. 352, 215 N.E. 2d 109 (Sup.Jud.Ct. 1966); Simons v. Fried, 302 N.Y. 323, 98 N.E. 2d 456 (Ct.App. 1951); Kristt v. Whelan, 4 A.D.2d 195, 164 N.Y.S. 2d 239 (App.Div. 1957), aff'd 5 N.Y.2d 807, 181 N.Y.S. 2d 205, 155 N.E. 2d 116 (Ct.App. 1958)."

* * * *

"The opinion of the Pennsylvania Supreme Court in Garner v. Girard Trust Bank, 442 Pa. 166, 275 A.2d 359 (1971), clearly supports the enforceability of the restrictive condition so long as the determination of the company as to the actuality of competition is not made arbitrarily. In view of the conclusion by this court that the board of directors was reasonably justified in finding that plaintiff did engage in competitive activity, the forfeiture provision in the plan would normally be enforceable."

* * * *

"In Kristt v. Whelan, 4 A.D. 2d 195, 164 N.Y.S. 2d 239 (App. Div. 1957) aff'd 5 N.Y. 2d 807, 181 N.Y.S. 2d 205, 155 N.E. 2d 116 (Ct.App. 1958), the New York court sustained the position of the employer in barring recovery of any sum from a pension trust because of the forfeiture produced by competitive activity, despite the fact that the forfeiture provision resulted from an amendment during the employment. To the same effect, see McNevin v. Solvay Process Co., 32 App. Div. 610, 53 N.Y.S. 98 (App. Div. 1898), aff'd 167 N.Y. 530, 60 N.E. 1115 (Ct.App. 1901); McCostis v. Nashua Pressman Union, supra.; Connors v. Howard Stores Corp. 23 A.D. 2d 686, 257 N.Y.S. 2d 608 (App. Div. 1965). This determination is bottomed upon the right of amendment reserved in the underlying trust indenture and the concept that the inchoate right of the employee does not become vested until the termination of his employment. Hence, these courts conclude that the amendment is a valid and enforceable provision as applied to the total benefits which may have been due at the time of vesting, namely the termination of employment."

* * * *

> "It is the opinion of this court that these holdings should be applied herein and that the reservation of an unlimited right to amend by the employer in a pension plan, followed by a forfeiture provision adopted by amendment after the commencement of employment, contractually supports the validity of the forfeiture as to all benefits prior to vesting."

In so stating, the Evo Court proceeded on the premise, long recognized in New Jersey, that a pension and profit sharing plan which is clearly voluntary on the part of an employer, and to which an employee does not make any contribution, at best only create rights in employees contingent on adherence to the conditions provided for the receipt of distributions. See Dolan v. Heller Bros. Co., 30 N.J. Super. 440, 104 A.2d 860 (Ch. 1954). See also Hindle v. Morrison Steel Co., 92 N.J. Super. 75, 223 A.2d 193 (App. Div. 1966), in which the Court clearly recognized the validity and enforceability of a clause similar to that here involved as it affirmed a jury verdict that the relevant discharge had not been for cause.

That the New Jersey Courts would come to such a conclusion is not only established by the Evo case cited above but also by Specht v. Eastwood-Neally Corporation, supra, in which the court upheld application of a pension agreement clause providing for forfeiture of pension payments if the employee wilfully acted to prejudice or injure the employer-corporation. In reaching such a conclusion the

Specht Court considered only the contingent nature of the employee's rights under the relevant Plan and the prophylactic rationale behind the "forfeiture" clause, and unlike the Court below, did not imply a nonexistent intent to liquidate damages.

The position of the Court below thus inherently disregards the rationale and conclusions of the controlling decisions of the New Jersey courts. In the cases already cited above, the courts upheld the "forfeiture" by former employees of pension and deferred compensation payments in accordance with forfeiture provisions in the relevant Plans where the former employee engaged in post-employment competition with the former employer. These cases, thus, establish not only that the "forfeiture" provisions in Rex's Pension and Profit Sharing Plans were not contrary to any public policy of New Jersey, but also that such provisions would be enforced by the courts of that State. Here there is greater justification for enforcing the "forfeiture" clause of the Plans than in the cases cited, since the loss of rights stems from breaches of fiduciary duties occurring during employment and not merely from post-employment competition. If such a "forfeiture" provision is enforceable against a former employee because of conduct committed after termination of his employment, it would seem an a fortiori case where the former employee violated his fiduciary duties prior to termination of his employment.

Unlike Bradford v. The New York Times, 501 F. 2d 51 (2d Cir. 1975), upon which the Court below relied, Rex is seeking to enforce an affirmative obligation based upon Goodstein's position as an officer of Rex. Recovery of Plan distributions is sought for breach of fiduciary duties during the employment period and not for breach of a post-employment obligation not to compete with plaintiff. The anti-competitive impact of the forfeiture in Bradford precluded any justification of the relevant clause in that case on prophylactic grounds: accordingly, it had to stand or fall as a liquidated damage clause. Such is not the case here.

## CONCLUSION

In view of the foregoing, the Court below erred in concluding that the "forfeiture" provisions of Rex's Pension and Profit-Sharing Plans were liquidated damage clauses and unenforceable because unrelated to actual damages. Accordingly, the judgment below should be reversed insofar as it denied Rex damages representing the $15,041 of Plan distributions paid to Goodstein by mistake and the case should be remanded with instructions to enter judgment for Rex in the additional amount of $15,041 plus interest from February 7, 1974.

Respectfully submitted,

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LASKER, D.J.

In this diversity action, Rex-Noreco, Inc., (Rex) seeks damages against Isidore Goodstein for breach of his fiduciary obligations while an employee of Rex, and an injunction and damages for breach of a covenant not to compete with Rex during or subsequent to his employment. Defendant Parksville Mobile Modular Homes, Inc., (Parksville) is a New York corporation formed by Goodstein through which he is alleged to have competed with Rex shortly after leaving its employ.

On May 20, 1974, we entered a preliminary injunction enjoining Goodstein and Parksville from operating a mobile home sales lot on the basis of plaintiff's prima facie showing that Goodstein, a former vice-president of Rex, was in violation of an agreement dated August 14, 1970 whereby he promised not to compete with plaintiff for two years following his resignation. The Court of Appeals affirmed our May 20, 1974 Order on July 3, 1974.

On July 30, 1974 Adam Filipowski purchased Parksville's assets and commenced operation of the sales lot. Subsequently Rex named him as a defendant claiming that the purchase transaction was not a bona fide transfer of Goodstein's interest in Parksville and, consequently, that any permanent injunction to be entered against Goodstein

and Parksville enjoining operation of the lot should also be effective as against Filipowski.

The case was tried to the court sitting without a jury. At trial defendants did not dispute either the existence of Goodstein's covenant not to compete with Rex or the fact that he and Parksville were in violation of its literal terms - the factors which led to the entry of the preliminary injunction. Instead, both sides directed their efforts to the issue whether the covenant is enforceable in the particular circumstances of this case.

As detailed in the following findings of fact and conclusions of law, we conclude that plaintiff is not entitled to a permanent injunction against defendants, but is entitled to damages for Goodstein's breach of fiduciary duty.

## I.

## Findings of Fact.

1. On August 14, 1970 Isidore Goodstein and Mark

Salitan, President of Rex-Noreco, Inc., executed an agreement whereby Goodstein promised, among other things:

> "to devote his entire time, skill, labor and attention to said employment [with Rex] ... [and] shall not have a financial or beneficial interest in any business or enterprise engaged in the same or similar business to that of [Rex]." (Paragraph 1)
>
> and
>
> "That on termination of [his] employment, for any reason whatsoever, he will not for two years thereafter engage either directly or indirectly in any business similar to or competitive with the business of [Rex within a two hundred mile radius from any of Rex's sales locations] nor will he within said period of time divert or attempt to divert from [Rex] ... any business whatsoever ..." (Paragraph 2)

2. Goodstein signed the August 14, 1970 Agreement voluntarily.

3. While an employee of Rex, Goodstein was a participant in the Rex-Noreco Employee Profit Sharing and Pension Plan. Section 11.2 of the Plan, as amended provides:

> "Discharge for cause: Any member who is discharged from employment of the company for cause shall lose and forfeit all his rights in and to the benefits under the Plan. The words 'discharge for cause' shall be deemed to include those cases where a member has been discharged for proven dishonesty ... engaging as a principal of a competitive

business, or disclosing trade secrets to a competitor."

4. Beginning in September 1973, while still an employee of Rex, Goodstein took steps to organize a retail mobile home business by negotiating with Han-Lo Associates for the rental of certain premises located at Parksville, in Sullivan County, New York

5. In October, 1973, Goodstein executed a lease with Han-Lo for the premises at Parksville, at which he ultimately operated the business of Parksville Mobile Modular Homes, Inc. (Parksville).

6. Parksville was incorporated by Goodstein in November 1973, by the filing of a Certificate of Incorporation with the Department of State of the State of New York.

7. In connection with the organization of Parksville, Goodstein charged a substantial number of long distance telephone calls to Rex, without the knowledge or consent of Rex.

8. While an employee of Rex, Goodstein did not disclose to Salitan or any other Rex official his activities in connection with the organization of Parksville; and no official of Rex permitted Goodstein to undertake the organization of any retail mobile home business.

9. Although Goodstein did not, for the last five

months of his employment devote his "entire time, skill, labor and attention" to Rex's business, he continued to accept his regular salary from Rex.

10. Parksville became actively engaged in the retail sale of mobile homes in April, 1974.

11. Rex did not have knowledge of Goodstein's plans to operate Parksville until April, 1974.

12. Goodstein's employment with Rex continued without interruption, except for a brief dispute with Salitan in August, 1973, until February 5, 1974.

13. On February 5, 1974, Goodstein's employment with Rex was terminated by his voluntary resignation.

14. Subsequent to the termination of his employment and prior to Rex's knowledge of the facts set forth in Paragraphs 4, 5, 6, 7 and 9 above, Goodstein requested and was given an accounting and distribution of his interest in Rex's pension and profit sharing plan, as well as severance pay and moving expenses.

15. Although Parksville engaged primarily in the business of selling new units, it occasionally accepted used units as trade-ins and offered such units for resale.

16. Parksville advertised its business in local publications, such as the Orange Shopper and the Catskill Shopper, which circulated in Sullivan, Orange, Ulster and Delaware Counties, New York.

17. Parksville drew customers from the counties adjacent to Sullivan County and from as far as New York City, New Jersey and Pennsylvania.

18. From 1969 to March 31, 1973, Rex was continuously engaged in the retail sale of mobile homes at its sales location in Loch Sheldrake, New York, through Loch Sheldrake Mobile Homes, Inc., its subsidiary.

19. Parksville Mobile Modular Homes, Inc., was located some seven miles from Rex's location at Loch Sheldrake.

20. In late March 1973, Loch Sheldrake Mobile Homes, Inc. sold to Morris Mirsky certain of its assets, including its sales lot, certain personalty and inventory.

21. Beginning on or about April 1, 1973 Morris Mirsky engaged in the retail sale of new mobile homes at the Loch Sheldrake location through Ramad Sales Corporation (Ramad).

22. Since April 1, 1973, Ramad and Rex have concurrently engaged in retail mobile home sales at the Loch Sheldrake location, with Ramad concentrating on the sale of new units and Rex on the sale of used units; by agreement with Rex, Ramad makes its sales personnel available to sell Rex's mobile homes subject

to Rex's supervision. Ramad salesmen in fact have made and are making such sales for which they are paid a commission by Rex.

23. On July 30, 1974, Adam Filipowski signed an agreement with Goodstein providing for Filipowski's purchase of the capital stock of Parksville.

24. At the time he signed the agreement of July 30, 1974, Filipowski had full knowledge of the pendency of this action, of the existence of the preliminary injunction entered on May 20, 1974 against Goodstein and Parksville, and of the fact that Parksville and Goodstein were operating although enjoined against doing so.

25. The only consideration paid by Filipowski to Goodstein for the capital stock of Parksville was Filipowski's promise to assume certain contingent liabilities of Parksville.

26. Prior to July 30, 1974, Goodstein had been receiving a salary from Parksville at the rate of from $100. to $150. per week. Goodstein's son, David L. Goodstein, had been paid at the rate of approximately $75. per week.

27. Subsequent to July 30, 1974, David Goodstein received as compensation from Parksville approximately $200. per week. David Goodstein lived in the home of his parents and after receiving the increase in pay to $200.

per week he commenced the payment of rent to them at the rate of $100. per week.

28. Subsequent to July 30, 1974, David Goodstein was the principal operator of the business of Parksville.

29. Both before and after his acquisition of Parksville, Filipowski was unfamiliar with the retail mobile home business and performed virtually no active duties in connection with Parksville's business even after his acquisition of Parksville.

30. Goodstein's sale to Filipowski of Parksville's assets was not a bona fide transaction, and was made in order to circumvent the preliminary injunction entered May 20, 1974.

31. Rex has service obligations under agreements with its customer banks and, through its subsidiary Rex Financial Corporation, owns retail installment contracts covering mobile homes located in the northeastern United States. On default of the purchaser, Rex in the ordinary course of its business may be required to repossess mobile homes securing up to $6,000,000. worth of retail installment contracts and to resell them through its various sales locations. If it defaults in the performance of such obligations, Rex is directly liable to the banks for amounts due and owing to them by the purchasers of the mobile homes.

32. The sale of new mobile home units competes with the sale of used, refurbished mobile homes depending on the relative prices of the particular units involved.

33. Parksville and Rex's sales location at Loch Sheldrake drew potential customers from the same geographic area. Their businesses compete with one another to the extent that (1) Rex sells refurbished units less than approximately three years old, (2) Parksville offers refurbished units taken as trade-ins on its new units and (3) Rex sells "like new," refurbished units which are priced similarly to factory new units offered by Parksville.

34. A substantial portion of the units offered for sale by Rex at the Loch Sheldrake location compete with the units offered by Parksville.

35. The effective geographic area of Loch Sheldrake's market extends to a radius of approximately 75 miles from Loch Sheldrake, New York.

36. In the course of his employment with Rex, Goodstein became familiar with Rex's business practices including its methods of pricing the sale of units, refurbishing used units and making financial arrangements with Rex's customer banks.

37. Rex's methods of financing, refurbishing and selling mobile homes do not differ appreciably from those

of its competitors.

## II.

## Conclusions of Law

1. The court has jurisdiction of the subject matter and of the parties.

2. Under New Jersey law, which is applicable as to the issue of the enforceability of the August 14, 1970 Agreement, such Agreement is not per se unreasonable and unenforceable.

3. Goodstein's employment with Rex was "terminated" within the meaning of the Agreement on February 4, 1974.

4. Parksville is a competing business of Rex, within the meaning of the Agreement.

5. Goodstein breached both his Agreement with Rex and his fiduciary duty to Rex in that, for the last five months of his employment he took steps to organize a competing business and improperly charged to Rex a portion of the cost of organizing such business, without disclosure to any official of Rex.

6. Had Rex discovered Goodstein's activities in connection with the organization of Parksville prior to his resignation from employment, it would have been entitled to discharge Goodstein "for cause" within the terms of the profit-sharing and pension plan and, assuming

the enforceability of the forfeiture provision, to deprive him of his accrued benefits under the plan amounting to $15,041.

7. If the forfeiture provision is an enforceable liquidated damages clause, Rex is entitled to recover from Goodstein his accrued benefits of $15,041. If the provision is not enforceable, Rex is entitled to damages as otherwise calculated for breach of the August 14, 1970 Agreement and breach of fiduciary duty.

8. Goodstein, as a former vice-president of Rex, possesses substantial knowledge about its particular operating practices and finance arrangements with customer banks, and was a highly valuable employee of Rex. However, the information which Goodstein possesses is not materially different from that possessed by others experienced in the retail mobile home business. Accordingly, Rex is not entitled to a further injunction against Goodstein's use of such information.

9. Although in the course of his employment Goodstein became familiar with Rex's bank customers, their names and locations are known to those in the trade and Rex is not entitled to an injuction against Goodstein's solicitation of such banks.

10. Since Rex is not entitled to an injunction against Goodstein, it is not entitled to an injunction against his successors in interest, Parksville and Filipowski.

11. Rex is not entitled to damages from Good-

stein, Filipowski or Parksville for any sales made by Parksville, except such damages as have been awarded or may be awarded for violation of the preliminary injunction entered May 20, 1974.

12. Rex is not entitled to punitive damages from any of the defendants.

The parties are directed to file memoranda within fifteen days setting forth their views on the following issues:

1. Whether the law of New York or New Jersey applies to determination of the damages to be assessed against Goodstein.

2. Whether, under the law of either or both states, the forfeiture provision in the profit sharing and pension plan is valid and enforceable.

3. What measure of damages applies to the findings of fact and conclusions of law set forth above, in the event the forfeiture provision is determined to be unenforceable.

The parties are also directed to submit proposed judgments on notice.

Dated: New York, New York
March 14, 1975.

MORRIS E. LASKER
U.S.D.J.

RECEIVED: 3/26/75

DATE 3/26/75

FINAL COPY - AMENDMENTS AT END

PEx. 47-A

REX-NORECO, INC.

EMPLOYEES' PENSION PLAN AND TRUST

AGREEMENT AND DECLARATION OF TRUST dated February 1, 1968 by and between REX-NORECO, INC., a New Jersey corporation, having its executive offices at 616 Palisades Avenue, Englewood Cliffs, New Jersey, (hereinafter called the "Company") and MARK A. SALITAN, residing at 30 Lynn Drive, Englewood Cliffs, New Jersey, SAUL B. SCHNEIDER, residing at 2514 Harbor Lane, Bellmore, New York, and DANIEL MENDL, residing at 80 Watnong Lane, Morris Plains, New Jersey (hereinafter called "Trustees");

W I T N E S S E T H:

WHEREAS, the Company has adopted a Pension Plan embodied herein (hereinafter referred to as the "Plan") for the benefit of certain Employees of the Company who may participate therein, in accordance with the terms and provisions hereinafter set forth, and as part of such Plan, desires to create a Trust Fund for the exclusive benefit of such Employees to which Trust Fund it is intended that contributions will be made by the Company for the purpose of distributing to such Employees the principal and income of the Trust Fund accumulated by the Trustees in accordance with such Plan; and

WHEREAS, it is the intention of the Company that the Plan conform with and be subject to the requirements of the Internal Revenue Code of 1954 and the Rules and Regulations issued thereunder by the Commissioner of Internal Revenue and the Secretary of the Treasury of the United States; and

FIRST AMENDMENT

TO

THE REX-NORECO, INC.

EMPLOYEES' PENSION PLAN AND TRUST

Whereas Article XI of the Rex-Noreco, Inc. Employees' Pension Plan and Trust reserves to the Company the right to make amendments thereto, the Rex-Noreco, Inc. Employees' Pension Plan and Trust is hereby amended in the following respects:

Section 4.3 (C) is hereby amended by deleting all of such Section 4.3 (C) and substituting for the deleted language a new Section 4.3 (C) which after the amendment shall read as follows:

"4.3 (C) Absence from service which is duly authorized by the Company, with or without pay, shall not be considered as a break in Continuous Service for the period during which such absence was authorized; leave of absence shall be granted in a non-discriminatory manner for reasons of health or education."

Section 10.2 entitled Discharge for Cause is hereby amended by deleting all of such Section 10.2 and substituting for the deleted language a new Section 10.2 which after the amendment shall read as follows:

"10.2 Discharge for Cause. Any Member who is discharged from the employment of the Company for Cause shall lose and forfeit all of his rights in and to the benefits under the Plan. The words 'Discharge for Cause' shall be deemed to include those cases where a Member has been discharged for proven dishonesty, the commission of a felony, the commission of misdemeanor involving moral turpitude, engaging as a principal of a competitive business, or disclosing trade secrets to a competitor."

Section 12.3 entitled Termination of the Plan on Happening of Certain Events is hereby amended by adding to the end of such Section 12.3 a new sub-section (D) which shall read as follows:

"(D) The complete discontinuance of contributions by the Comapny under the Plan".

Article XIII entitled Termination of Trust during First Ten Years is hereby amended by deleting all of the present Article XIII and replacing it with a new Article XIII which after the Amendment shall read as follows:

## ARTICLE XIII

### Termination of Trust During First Ten Years

Notwithstanding any provisions in this Agreement to the contrary, during the first ten (10) years after the establishment of the Trust under the applicable Prior Plan, the benefits provided by the Company's contributions for any Members who are included in such applicable Prior Plan as of the date of its establishment will be subject to the conditions set forth in the following sub-divisions hereof:

1. The Benefits payable to any such Member or his Beneficiary shall not exceed the larger of $20,000, or 20% of the average regular annual compensation up to $50,000 of such Member multiplied by the number of years since the establishment of the Trust under the applicable Prior Plan for which the full contributions required by the Prior Plan had been made. If at the end of the first ten (10) years of the Company's participation in the Plan, the full contributions required by the Plan have not been made. these restrictions will continue to apply until the full amount of contributions cumulatively required by the Plan have been made.

2. In the event of termination of the Trust within ten (10) years after the establishment of the Trust under the applicable Prior Plan, any benefits in excess of those set forth above shall be apportioned ratably among the remaining Members.

3. The provisions of this Article shall not restrict the payment of insurance, death or survivor's benefits account of a deceased Member or the payment of full retirement income benefits to a Retired Member.

Section 16.11 entitled Loans is hereby amended by deleting the last sentence of such Section and substituting for the deleted language a new last sentence which after the amendment shall read as follows:

> "The Trustees may also loan money to others, including the Company, but such loans must bear interest at not less than the then prevailing Savings Bank rate and must be adequately secured."

IN WITNESS WHEREOF, the Company has caused this instrument to be executed by its duly authorized officer as of this 28th day of June, 1968 and has caused its corporate seal to be affixed thereto.

REX-NORECO, INC.

BY _____
Mark A. Salitan, President

District Director
Internal Revenue Service

Date: AUG 20 1968

In reply refer to: Au:R:P:CS

Rex-Noreco, Inc.
616 Palisades Ave.
Englewood Cliffs, N.J. 07632

Gentlemen:

Reference is made to certain amendments dated January 29, 1968 submitted with a request that they be considered in connection with the Pension Plan for the Employees of Rex Agency Corporation and the Pension Plan for the Employees of Noreco Plan Corporation. A request was also submitted for determination as to the qualified status of Rex-Noreco, Inc. Employees Pension Plan and Trust executed on February 1, 1968 which consolidated and amended the first two listed plans, and added Little Britain Mobile Home Sales, Inc. and Anderson Mobile Home Sales, Inc. as participating employers.

All of these documents have been considered together with an additional amendment dated June 28, 1968, and it is the opinion of this office that your prior plans and this plan, as amended, meet the requirements of Section 401(a) of the Internal Revenue Code, and that the trust established thereunder continues to be entitled to exemption under the provisions of Section 501(a) of the Code.

It is noted that your plan provides for the exclusion of employees who are covered by any other non-governmental retirement plan contributed to by the employer other than the Rex-Noreco, Inc. Employees' Profit-Sharing Plan. There are no such employees in your company who are excluded for this reason at the present time. However, elimination of such employees is a future possibility under your plan, and you are cautioned that the opinion expressed in this letter will no longer apply if such elimination results in plan coverage that discriminates in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees.

This determination is in accordance with the pertinent provisions of the Internal Revenue Code and is not a determination regarding the applicability of other Federal statutes.

This office is to be notified in the event of termination of the plan (or trust).

Very truly yours,

J. Robert Murphy

J. Robert Murphy
Acting District Director

occur."

FINAL COPY / AMENDMENTS AT END Pg 48

REX-NORECO, INC.

EMPLOYEES' PROFIT-SHARING PLAN AND TRUST

AGREEMENT AND DECLARATION OF TRUST dated February 1, 1968 by and between REX-NORECO, INC., a New Jersey corporation, having its executive offices at 616 Palisades Avenue, Englewood Cliffs, New Jersey, (hereinafter called the "Company") and MARK A. SALITAN, residing at 30 Lynn Drive, Englewood Cliffs, New Jersey, SAUL B. SCHNEIDER, residing at 25[illegible] Harbor Lane, Bellmore, New York, and DANIEL MENDL, residing at 80 Watnong Lane, Morris Plains, New Jersey (hereinafter called "Trustees");

W I T N E S S E T H:

WHEREAS, the Company has adopted a Profit-Sharing Plan embodied herein (hereinafter referred to as the "Plan") for the benefit of certain Employees of the Company who may participate therein, in accordance with the terms and provisions hereinafter set forth, and as part of such Plan, desires to create a Trust Fund for the exclusive benefit of such Employees to which Trust Fund it is intended that contributions will be made by the Company for the purpose of distributing to such Employees the principal and income of the Trust Fund accumulated by the Trustees in accordance with such Plan; and

WHEREAS, it is the intention of the Company that the Plan conform with and be subject to the requirements of the Internal Revenue Code of 1954 and the Rules and Regulations

FIRST AMENDMENT

TO

THE REX-NORECO, INC.

EMPLOYEES' PROFIT-SHARING PLAN AND TRUST

Whereas Article XII of the Rex-Noreco, Inc. Employees' Profit Sharing Plan and Trust reserves to the Company the right to make amendments thereto, the Rex-Noreco, Inc. Employees' Profit-Sharing Plan and Trust is hereby amended in the following respects:

Section 4.3 (C) is hereby amended by deleting all of such Section 4.3 (C) and substituting for the deleted language a new Section 4.3 (C) which after the amendment shall read as follows:

> "4.3 (C) Absence from service which is duly authorized by the Company, with or without pay, shall not be considered as a break in Continuous Service for the period during which such absence was authorized; leave of absence shall be granted in a non-discriminatory manner for reasons of health or education."

Section 6.6 entitled Allocation of Income, Expenses and Losses is hereby amended by deleting the word "forfeitures" from line 9 of such Section 6.6.

Section 6.7 entitled Forfeitures is hereby amended by deleting the first sentence of such Section 6.7 and substituting for the deleted language a new first sentence which after the amendment shall read as follows:

> "The amount of any forfeitures, as provided in Sections 8.2 and 11.5 hereof, shall be debited to the accounts of the respective Members who are subject to such forfeitures, and shall be credited proportionately to the accounts of the remaining Members in proportion to the Company Contributions allocated to the accounts of such remaining Members during the Plan Year in which such forfeitures shall occur."

Section 11.2 entitled Discharge for Cause is hereby amended by deleting all of such Section 11.2 and substituting for the deleted language a new Section 11.2 which after the amendment shall read as follows:

> "11.2 Discharge for Cause. Any Member who is discharged from the employment of the Company for cause shall lose and forfeit all his rights in and to the benefits under the Plan. The words 'Discharge for Cause' shall be deemed to include those cases where a Member has been discharged for proven dishonesty, the commission of a felony, the commission of misdemeanor involving moral turpitude, engaging as a principal of a competitive business, or disclosing trade secrets to a competitor."

Section 13.3 entitled Termination of the Plan on Happening of Certain Events is hereby amended by adding to the end of such Section 13.3 a new sub-section (D) which shall read as follows:

> "(D) The complete discontinuance of contributions by the Company under the Plan".

Section 15.11 entitled Loans is hereby amended by deleting the last sentence of such Section and substituting for the deleted language a new last sentence which after the amendment shall read as follows:

> "The Trustees may also loan money to others, including the Company, but such loans must bear interest at not less than the then prevailing Savings Bank rate and must be adequately secured."

IN WITNESS WHEREOF, the Company has caused this instrument to be executed by its duly authorized officer as of this 28th day of June, 1968 and has caused its corporate seal to be affixed thereto.

REX-NORECO, INC.

BY Mark A. Salitan

Mark A. Salitan, Pres.

District Director
Internal Revenue Service

Date: AUG 20 1968

In reply refer to: Au:R:P:CS

Rex-Noreco, Inc.
616 Palisades Ave.
Englewood, N.J. 07632

Gentlemen:

Reference is made to the Rex-Noreco, Inc. Employees' Profit-Sharing Plan and Trust executed on February 1, 1968 which consolidated and amended the Rex Agency Corp. Employees' Profit-Sharing Plan and Trust and the Noreco Plan Corp. Employees' Profit-Sharing Plan and Trust. The Rex-Noreco, Inc. Employees' Profit-Sharing Plan and Trust was submitted to this office with a request for determination as to its qualified status together with that of Little Britain Mobile Home Sales, Inc. and Anderson Mobile Home Sales, Inc. which adopted the plan and Trust.

Your plan has been considered together with additional amendments dated June 28, 1968 and it is the opinion of this office that your prior plans and this plan, as amended, meet the requirements of Section 401(a) of the Internal Revenue Code, and that the trust established thereunder continues to be entitled to exemption under the provisions of Section 501(a) of the Code.

It is noted that your plan provides for the exclusion of employees who are covered by any other non-governmental retirement plan contributed to by the employer other than the Rex-Noreco, Inc. Employees' Pension Plan. There are no such employees in your company who are excluded for this reason at the present time. However, elimination of such employees is a future possibility under your plan, and you are cautioned that the opinion expressed in this letter will no longer apply if such elimination results in plan coverage that discriminates in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees.

occur."

This determination is in accordance with the pertinent provisions of the Internal Revenue Code and is not a determination regarding the applicability of other Federal statutes.

This office is to be notified in the event of termination of the plan (or trust).

Very truly yours,

J. Robert Murphy

J. Robert Murphy
Acting District Director

occur."